The First Conference on Public Law in the Common Law World: Some Impressions of an Outsider

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Forming a discipline

The organisers' aim is to establish a biannual conference for public lawyers akin to the Obligations series which runs at the University of Western Ontario in Canada. The process of emancipation from private law reminds one of the formation of a distinct public law on the continent as Michael Stolleis has described for Germany, and the Cambridge conference may remind German public lawyers of the Staatsrechtslehrertagung, the annual meeting of German public law professors (whose internet appearance is in German only). Against this background, the conference provided some interesting insights into the formation of a new field of legal research.

The widely advertised call for papers invited scholars from all over the common law world to send in their proposals. The response was immense, and the organisers had to choose 50 out of 170 proposals. In the programme, the convenors tried to strike a balance between plenary sessions and parallel panels, established scholars and early career researchers, men and women, English scholars and scholars from other common law jurisdictions. Quite a challenge to put together such a programme. The result was impressive, as can be seen from the extensive and excellent twitter coverage provided by the organisers and others.

This short report cannot do justice to the richness and variety of papers that were presented, nor am I, as a continental lawyer, in a position to meaningfully contribute to the debates. Notwithstanding this disclaimer, however, I found the conference to be highly stimulating, and felt that it provided me with a rough idea of the current struggles public lawyers in common law jurisdictions are facing up to.

Is there such a thing as "common law"?

Bringing together legal scholars from the UK, Canada, Australia, South Africa, the United States, New Zealand, etc., a recurring point of discussion was whether such a thing as a common "common law" still existed. As Richard Rawlings put it in a Q&A session: Does not the embedding of UK law within a European legal framework set it apart from other common law jurisdictions, which are neither under the influence of the Luxembourg Court nor the Strasbourg Court? In her closing statement, Cheryl Saunders remarked that the common law was a "rather odd beast": because context matters so much for it, the diverging contexts in the various common law jurisdictions made it quite a task to decide whether there was still "enough in common" to talk about "the common law". Saunders pointed to forms of "legal nationalism" but insisted that there were enough "similarities across the common law world" for a joined common law conference to make sense. Carol Harlow also referred to "a common vocabulary and methodology" of legal scholars working in common law jurisdictions different from the one employed by continental legal scholars.

With the wide range of common law jurisdictions present at the conference, many papers used comparative approaches. Much time in the debates was spent on comparing diverging developments of assumedly shared common law concepts in the different jurisdictions. To give an example: the reasonableness test of the traditional Wednesbury doctrine has apparently evolved quite differently in England, Canada or South Africa, even though all started with the very same decision. However, certain shared assumptions could still be detected, especially concerning the paramount role of courts and their judgments. Mark Elliott, as a co-convenor of the conference, also concluded in his blog that "common law systems are simultaneously similar to and different from one

another".

"Process and Substance" in Common Law Public Law

The topic of "process and substance" draws on a recurring theme in common law scholarship. Usually, continental lawyers often associate public law in common law jurisdictions with procedural approaches. It became quite clear in the course of the conference that many simultaneous developments are blurring the line: since 1982, the Canadian Charter of Rights and Freedoms necessitates courts to consider possible right infringements substantially, and so does the English Human Rights Act of 1998.

Judicial Review, therefore, was of paramount interest to the presenters. Different from e.g. the German constitutional concept, which provides for a seamless web of remedies against potential infringements of individual rights (Art. 19 (4) Basic Law), the idea of all-embracing judicial review is foreign to common law jurisdictions. It is then an essential question in which cases remedies should be granted and on which grounds. In deciding this question, concepts of democracy play a role that are firmly rooted in the doctrine of parliamentary sovereignty. Yet, the doctrine itself is contested, as can be seen in a statement of the role-model Westminster parliament, referring inter alia to the challenges originating from the Human Rights Act 1998, the Accession to the European Economic Community in 1972 or – particularly pertinent at the moment – the devolution of power to Scotland and Wales. Other common law countries that have adopted codified constitutions are also trying to conceive of new ways to understand separation of powers. It is not beyond possibility that the United Kingdom might follow before too long (see the magna carta proposal commented upon by the Chair of the Political and Constitutional Reform Committee MP Graham Allen here).

The role of courts has changed dramatically in all common law countries. Where once they were principally considered the creators (or discoverers) of the "common law", statutory interpretation is now a significant part of the judicial role: after all, democratic societies are ruled and reformed by way of enacted law, and it is the job of courts to apply and interpret them. Thus, new frameworks for a common law theory of separation of power were obviously at the heart of many debates at the Cambridge conference. Also in common law jurisdictions, public law consists of both constitutional and administrative law, and their relationship with each other is not easily described, discerned, and disentangled.

Common Law and Continental Law in dialogue?

The Cambridge conference nearly exclusively assembled scholars from the common law world – I am not aware of another continental scholar participating. That I found a bit disappointing as there are so many topics on which dialogue between the jurisdictions could contribute to creating new vistas and insights, for both sides. Of course, there is the language problem. And I understand the need for exchange between common law scholars which Carol Harlow in her closing remarks highlighted, herself an eminent comparative lawyer who often converses with continental legal scholars. However, domestic legal orders have long since ceased to exist in parochial particularism and are interconnected in multiple ways, especially in Europe. While the influence of the Strasbourg human rights rulings on English law has been widely dealt with, it would also have been interesting to see whether continental concepts make their way into English or Irish law via EU law. In the same vein, notably absent from the programme were all topics to do with international law or processes of globalisation, as both Saunders and Harlow critically noted.

Intriguing as the conference was for me as an outside observer, I tend to think that the connection and exchange between common law and continental law needs more consideration, even more so as there seems to be a general sentiment that the jurisdictions are converging. At the same time, I realise that there continues to be a demand for conferences with a focus on just one type of jurisdiction (common law, continental law, or national law conferences).

It will be interesting to see how all the fascinating discussions will develop when the biannual Public Law conference is continued in 2016, then again in Cambridge.

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